

§ 537.404 Purchase of shares in economic development projects in Burma.

The purchase of shares, including an equity interest, in the economic development of resources located in Burma, is prohibited when those shares are purchased after the effective date directly or indirectly from the Government of Burma or a nongovernmental entity in Burma, unless purchased pursuant to an agreement entered into prior to May 21, 1997. U.S. persons may purchase debt instruments issued by the Government of Burma or a nongovernmental entity in Burma, directly or indirectly, provided that such instruments are not convertible into equity, and do not provide for participation, including as collateral or security, in royalties, earnings, or profits in the economic development of resources located in Burma.

§ 537.405 Investments in entities involved in economic development projects in Burma.

(a) The purchase of shares in a third-country company that is engaged in the economic development of resources located in Burma is prohibited by § 537.201 where the company's profits are predominantly derived from the company's economic development of resources located in Burma.

(b) If a U.S. person holds shares in an entity which subsequently engages exclusively or predominantly in the economic development of resources located in Burma or subsequently derives its income exclusively or predominantly from such economic development, the United States person is not required to relinquish its shares, but may not purchase additional shares. Divestment of the shares in such an entity to a foreign person — constituting the facilitation of that foreign person's investment in Burma — is authorized under general license pursuant to § 537.504.

§ 537.406 General supervision and guarantee.

Section 537.201 prohibits the entry by a U.S. person into a contract providing for the general supervision and guarantee of another person's performance of a contract that includes the economic

development of resources located in Burma, if the U.S. person's contract is entered into on or after the effective date, unless undertaken pursuant to, or in exercise of rights under, a pre-effective date agreement. For the purposes of § 537.201, only the entry into contracts for supervision and guarantee at the top level of project management, such as entry into a contract with a development project's sponsor or owner to become a prime contractor or general manager for a development project, will be considered new investment in Burma. By contrast, subcontracts to provide goods, services, or technology to a prime contractor or general manager of a development project are exempt from the prohibitions of this part pursuant to § 537.204 unless:

(a) The functional scope of the subcontractor's obligations is substantially similar to that of a prime contractor's or general manager's obligations; or

(b) The consideration for such subcontracts includes a share of ownership in, or participation in the royalties, earnings or profits of, the economic development of resources located in Burma.

§ 537.407 Activities under pre-May 21, 1997 agreements.

(a) Activities undertaken by a U.S. person pursuant to an agreement entered into prior to May 21, 1997, between the U.S. person and the Government of Burma or a nongovernmental entity in Burma are not prohibited new investments, as defined in § 537.308.

(b) A U.S. person who is a party to a pre-effective date agreement for the development of economic resources located in Burma may enter into subsequent agreements with foreign persons where such agreements are pursuant to, or in exercise of rights under, the pre-effective date agreement. The facilitation of foreign persons' investment in Burma under these circumstances is authorized pursuant to the general license contained in § 537.504.

(c) A U.S. person may not enter into a contract for the economic development of resources located in Burma after May 21, 1997, if pursuant to, or in

exercise of rights under, a pre-effective date agreement, unless the contractual arrangement is specifically contemplated in the pre-effective date agreement.

(d) The exercise of rights under pre-effective date agreements may include the exercise of options to extend the contract, depending on such factors as the degree of specificity with which the option to extend is described in the pre-effective date agreement, and the degree to which the party wishing to renew can enforce its decision to exercise the option.

§ 537.408 Sale or purchase of goods, services or technology.

(a) Section 537.204 exempts from any prohibition under this part the entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology, except:

(1) Where the entry into a contract on or after the effective date is for the general supervision and guarantee of another person's performance of a contract for the economic development of resources located in Burma; or

(2) Where such contract provides for payment, in whole or in part, in:

(i) Shares of ownership, including an equity interest, in the economic development of resources located in Burma; or

(ii) Participation in royalties, earnings, or profits in the economic development of resources located in Burma.

(b) *Examples:* The following examples are based upon the assumption that neither § 537.204(a) nor § 537.204(b) applies.

(1) A U.S. person may market goods or services in Burma through a sales representative or sales agent, or through a U.S. person or subsidiary established and operating in Burma before May 21, 1997, or through any established foreign (including Burmese) distributorship. The U.S. person may not, however, establish and operate a new business, branch, office or showroom in Burma to market such goods or services or facilitate the establishment of a new foreign entity to do so. This would constitute the development of a commercial resource.

(2) A U.S. person may rent, lease or purchase space in existing buildings in

connection with the continued operation of a business in operation prior to the effective date. It may change locations, modify and renovate existing space and upgrade machinery or equipment. Unless pursuant to a pre-effective date agreement or the exercise of specific rights under such agreement, however, the U.S. person may not expand its business operations by opening additional stores, branches, offices or showrooms beyond the number that were in existence immediately prior to May 21, 1997. The U.S. person may not construct a new commercial building to house its business as this would constitute the economic development of land and commercial resources in Burma.

(3) A U.S. person involved in exempt activities may hire and train Burmese employees to carry out such activities. The employment of personnel in Burma under these circumstances is considered the purchase of employment services which is exempt from prohibition under § 537.204. Any training incidental to the performance of the employee's services is likewise exempt. For example, a U.S. person engaged in the sale of copy machines may hire and train a Burmese employee to carry out activities pursuant to such sales, including office support personnel, personnel to provide after-sale service and maintenance in accordance with the terms of a purchase or lease agreement, sales representatives and supervisory personnel. A U.S. person may not, however, open a business after the effective date, the purpose of which is the sale of vocational skills training in the maintenance of copy machines, as this would constitute the economic development of human resources in Burma.

(4) Contracts for the purchase or sale of services incident to the registration and renewal of patents, trademarks and copyrights are not prohibited by this part.

(5) A U.S. bank is allowed to provide trade financing as a service either to the Government of Burma or to non-governmental entities in Burma, but cannot provide them loans earmarked for economic development of resources in Burma if loan repayment is secured by the project. A U.S. bank can provide development project financing as a